

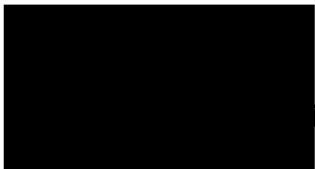


U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



Public 2/3/00

File: EAC 99 063 51234 Office: Vermont Service Center

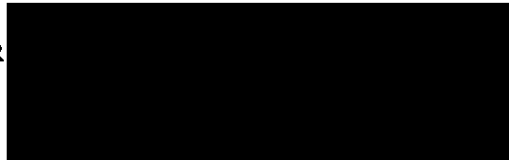
Date: JAN 21 2000

IN RE: Petitioner:  
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

IN BEHALF OF PETITIONER



Identify  
prevent clearly  
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Terrance M. O'Reilly, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It desires to employ the beneficiary as a specialty cook for a period of one year. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined a temporary need for the beneficiary's services had not been established.

On appeal, counsel states that the petitioner can find neither temporary nor permanent help for the position. Counsel also states that the beneficiary is supposed to train the staff and leave.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

an alien...having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. See 55 Fed. Reg. 2616 (1990).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. 214.2(h)(6)(ii)(B).

The petition indicates that the employment is a one-time occurrence and the temporary need is periodic. The regulation at 8 C.F.R. 214.2(h)(6)(ii)((B)~(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish that it will not need workers to perform the services or labor in the future.

In its letter dated February 4, 1999, the petitioner states that the foreign specialty cook is expected to train the current staff as to the basics of Brazilian cuisine.

The nontechnical description of the job in the newspaper, on the Application for Alien Employment Certification (Form ETA 750) and the petition itself does not reflect these duties. Instead, the duties are described on the petition as "plan menu and cook Brazilian specialty-style meals, including regional vegetarian dishes, according to recipes. Prepare vegetables, pasta, grains and meats for cooking. Boil, broil, fry, or bake vegetables and meats. Buy food, clean kitchen, prepare fancy dishes and serve meals." These duties are ongoing and cannot be classified as duties that will not need to be performed in the future.

Petitions pursuant to section 101(a)(15)(H)(ii) of the Act for a class or type of employee for which the petitioner has a permanent need where the petitioner makes attempts to establish the temporariness of its need for the beneficiary's services by stipulating that the beneficiary will function as a trainer or instructor rather than in a productive capacity must be accompanied by evidence of the existence of a training program, by evidence that the petitioner has recruited or hired trainees, and by evidence that the petitioner can viably employ a full-time instructor and can viably simultaneously operate a training program and a commercial or other enterprise. Matter of Golden Dragon Chinese Restaurant, 19 I&N Dec. 238 (Comm. 1984).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.